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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 46

CHARLES A. MEEKER and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

VIVIAN DIFFENDAFFER,
570 First National Building,
Oklahoma City, Oklahoma,
Counsel of Record for Respondent.

C. HAROLD THWEATT,
570 First National Building,
Oklahoma City, Oklahoma,
Attorney for Respondent.

February, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8750

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 641

CHARLES A. MEEKER and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Although the facts are stated in the Opinion of the Court of Appeals (308 F.2d 875), we will briefly restate the facts.

Hettie E. Lowder owned the NW/4 and W/2 NE/4 of Section 23-16N-4W, Logan County, Oklahoma, containing 240 acres.

On June 3, 1953, Hettie E. Lowder executed and delivered a five-year oil and gas lease to H. S. Smith, covering the E/2 NW/4 and W/2 NE/4 of Section 23-16N-4W, containing 160 acres. By mesne assignments, this lease was

assigned to W. G. Haun. On December 30, 1957, Haun assigned the lease to Herman L. Hurst, reserving an overriding royalty of 1/16th of 7/8ths, which said overriding royalty was expressly made applicable to any extensions or renewals of this lease.

On April 30, 1958, Hurst procured from Hettie E. Lowder an oil and gas lease (covering the same 160 acres) having a term of thirty (30) days from June 3, 1958. This lease was recorded in Book 385, page 694. In recognition of his override, Hurst assigned to Haun a 1/16th of 7/8ths overriding royalty under this thirty (30) day lease.

Prior to procuring the thirty (30) day oil and gas lease mentioned in the preceding paragraph, Hurst had entered into an agreement with Domestic Oil Corporation, American Drilling Company (an affiliate of Domestic Oil Corporation) and the Meekers, whereunder a test well was to be drilled on the Robinson farm which was situated near the Lowder farm. The Robinson farm covers the SW/4 of Section 23-16N-4W. The thirty (30) day Lowder lease had been procured by Hurst for the benefit of Domestic Oil Corporation, Hurst and the Meekers. Both the Meekers and Domestic had sold out small interests in the leasehold estate to various parties.

On July 1, 1958 (two days before the expiration of the primary term of the thirty [30] day lease), at the request of Hurst a well location was staked on the Lowder farm, and some bulldozer work was done. Nothing was done thereafter at this particular location.

On July 22, 1958, Hettie E. Lowder executed and delivered to Ambassador Oil Corporation, in consideration of a cash bonus, an oil and gas lease covering the entire Lowder farm, containing 240 acres. This lease was recorded August 14, 1958, in Book 388, page 639.

In the latter part of August, 1958, Domestic Oil Corporation, apparently in ignorance of the Ambassador lease, and apparently believing that the thirty (30) day lease was still effective, caused a well location to be staked on the SW/4 NE/4 in Section 23-16N-4W, and on or about September 7, 1958, spudded a well exploratory for oil and gas at this location. As noted hereinabove, this location was at a different location than the well staked by Hurst.

Ambassador, upon learning that Domestic was drilling on the Lowder farm, notified Domestic that Ambassador owned the oil and gas leasehold estate covering said land. Upon receipt of this notice, Domestic stopped drilling. Domestic's attorney was consulted, and he advised that the thirty (30) day lease was probably dead. Negotiations were commenced between Ambassador and Hurst, and as a result of these negotiations Ambassador assigned its oil and gas lease to Domestic insofar as said lease covered the E/2 NW/4, and W/2 NE/4 of Section 36-16N-4W. The assignment from Ambassador to Domestic is dated September 15, 1958, and was recorded September 30, 1958, in Book 390, page 592. The assignment contained this provision:

> "(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; . . ."

After receiving the assignment of the Ambassador lease, Domestic resumed drilling of the well on the Lowder farm, and, subsequently, the well was completed as a producing oil well.

On October 8, 1958, Domestic Oil Company assigned to Charles A. Meeker and Sybil Meeker, as joint tenants, an undivided one-half interest in the Ambassador lease insofar as the lease covers the E/2 NW/4, and W/2 NE/4 of Section 23-16N-4W. This assignment contained this provision:

> "This assignment is made SUBJECT to the TERMS AND PROVISIONS of the agreement dated October 8, 1958, between Assignor and CHARLES A. MEEKER and is SUBJECT to its proportionate part of an outstanding 3/32 OVERRIDING ROYALTY INTEREST and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is SUBJECT to all of the provisions of the lease assignment from the AMBASSADOR OIL CORPORATION to DOMESTIC OIL CORPORATION recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma."

ARGUMENT

1. The decision below is in accord with the controlling decisions of this Court.

The Second Amended Complaint upon which this action was tried stated two causes of action: the first, to quiet title under the 30-day oil and gas lease; the second, for money damages for slander of title to that lease.

Jury trial was demanded by endorsement on the Complaint, but was denied on the ground that the action was essentially an equitable action.

At the time the action was filed, and at the time the action was tried, the plaintiffs and their co-owners were in possession of the property producing oil and gas therefrom. The plaintiffs were among the working interest owners. They were also the owners of an overriding royalty. This was true whether the 30-day oil and gas lease was established as the valid lease or whether the Ambassador lease was established as the valid lease.

The trial court found that, as a matter of law, the 30-day oil and gas lease terminated for want of diligent development, and this finding was sustained by the Court of Appeals.

The plaintiffs admitted that no operations had been conducted between July 2 and the latter part of August. They sought to excuse this lack of diligence for a legal reason: namely, a possibility of well spacing by the Oklahoma Corporation Commission. Both the trial and the appellate court held that the mere possibility that the Corporation Commission might space the area for drilling for and the production of oil and gas did not constitute a valid reason for failure to pursue the drilling operations with due diligence. That the mere possibility of the establishment of drilling and spacing units would not prohibit drilling or constitute a legal excuse for drilling, seems obvious

The plaintiffs were not entitled to a jury trial in the quiet title action. Plaintiffs, together with their co-owners

of the working interest, were in possession of the land covered by the oil and gas lease producing oil and gas therefrom. In addition to this, an Oklahoma ejectment will not lie to enforce rights under an oil and gas lease when the lessee has not been in possession. *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551, 36 S. Ct. 711, 60 L. Ed. 1161; *Frey* v. *Glenn*, 206 Okla. 28, 240 P.2d 1061 (1952). Therefore, the plaintiffs neither could nor were required to bring an action in law in ejectment. They could proceed in equity.

An action to quiet title is an equitable action. *Perego* v. *Dodge*, 163 U.S. 158, 41 L. Ed. 113 (1896); *Burkhard* v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th, 1948); *Humble Oil & Refining Company* v. *Sun Oil Company*, 191 F.2d 705 (C.C.A. 5th, 1951); *Hester* v. *Watts*, 203 Okla. 97, 218 P.2d 641 (1950).

A jury trial is not a matter of right in an equitable action. *Parsons* v. *Bedford*, 28 U.S. (3 Peters) 433, 7 L. Ed. 732 (1830); *Barton* v. *Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881); *Burkhard* v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th, 1948); *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation*, 124 F.2d 563 (C.C.A. 2d 1942); 31 Am. Jur., Jury, Sec. 24.

A Court of Equity having taken jurisdiction will retain jurisdiction in order to grant complete relief. *Camp* v. *Boyd*, 229 U.S. 530, 33 S. Ct. 75, 57 L. Ed. 1317 (1912); *Barton* v. *Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881); *Schaefer* v. *Gunzburg*, 246 F.2d 11, 15 (C.C.A. 9th, 1957) (*cert. denied* 355 U.S. 831, 2 L. Ed.2d 43); 5 Moore's Federal Practice,

2nd Ed., paragraph 38.19(2), page 169; 19 Am. Jur., Equity, Secs. 125, 127, pages 125 and 126.

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 918 (1936), this Court speaking through MR. CHIEF JUSTICE HUGHES, said:

> "The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . (citing cases). Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law . . . (citing cases)."

Under the law of Oklahoma, the claim for money damages would be treated as incidental to the quiet title suit. *Russell* v. *Freeman*, 202 Okla. 421, 214 P.2d 443 (1950). There would be no jury trial.

Having evoked the aid of equity to establish the very right upon which their claim for damages depends, the plaintiffs should not be heard to urge that the court, without the intervention of a jury, had no right to consider the case. If the claim for damages can be decided only by a jury, and if the claim for damages must be heard either prior to a determination of the equity question, or simultaneously therewith, manifestly it would be impossible for the case to be tried except by a jury. In effect every equitable action, by the assertion of a claim for damages, would

be transformed into a jury action. We submit that this result is not desirable, or workable. We submit that if a case is one that is predominately equitable, it should be tried by the court, with or without an advisory jury, as the trial court determines.

We submit that the right to a jury trial should be governed by determining whether the basic character of the action is legal or equitable. This Court has recognized this principle as is shown by the cases cited. This is the rule in Oklahoma as is shown by *Russell* v. *Freeman, supra.* It seems to be the test which is applied in most jurisdictions. 31 Am. Jur., Jury, Secs. 24 and 25.

This philosophy was expressed in *Institutional Drug Distributors* v. *Yankwich*, 249 F.2d 566, 569 (C.C.A. 9th, 1957), wherein the Court said:

> "It is not on every complaint now filed that a jury trial is accorded, even if there are issues normally triable at law and even if there is the requisite demand therefor. The Federal Rules of Civil Procedure did not change these principles, but affirmed them, since specific reference is made to the Seventh Amendment. A law action may be pleaded in the same complaint as a suit in equity. But, if the whole matter fall within the limits of equity jurisdiction, even separate statement and timely demand will not suffice. It is obvious also that although an independent counter-claim can be, and often must be pleaded under the Rules, it does not change the limits of equity jurisdiction."

Any other rule leads to procedural difficulties which are profound. If all questions of fact which relate to an

incidental issue in an equitable action, which, if unrelated, would have been triable to a jury at common law, must be segregated and submitted to a jury, procedural chaos results. The end result of such a rule will be the impanelment of a jury in every case; in cases which are basically equitable, a needless imposition upon the time of citizens who are compelled to serve upon an unnecessary jury.

There was no right to a jury trial in an equity action in England, and the Seventh Amendment guaranteed none, for, as we all know, the right to a jury trial was preserved in this nation as it had heretofore existed in England.

Although *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), have no application to the facts of this case, there is *dicta* in those opinions which might encourage one to make the assertion that the petitioners make in their brief (page 8): "As long as any legal cause is involved, the jury rights it creates control." We submit that this is not the law despite the *dicta* in these two cases, and we further submit that it ought not to become the law.

2. The denial of a jury trial on the second cause of action was, at the most, harmless error.

Under all the precedents, a quiet title action is an equity action triable to the court. Unless this Court holds that the trial court had no power to try the quiet title action, prior to trying the claim for slander of title, it is obvious that the case would never have reached the jury. The plaintiffs had no title; therefore, there could have been no

slander of title. Had a jury been impaneled, it would have served no function but to render a directed verdict.

Had the plaintiffs omitted from their complaint all reference to quieting title, and sued solely for slander of title, they would have been forced to prove their title as a condition of recovery. And had the case proceeded in this fashion, the trial court would have directed a verdict for the defendant. The trial court would have been compelled to hold that failure to pursue drilling operations under the 30-day lease with due diligence caused the lease to terminate as a matter of law. *Gillespie* v. *Dougherty*, 179 Okla. 330, 65 P.2d 486 (1937); *Moore Oil Inc.* v. *Snakard*, 150 F. Supp. 250 (Okla. W. D., 1957). There were admittedly no operations under the 30-day lease for a period of nearly 60 days after the expiration of the primary term, and the lease died as a matter of law.

The court may direct a verdict where the plaintiff fails to prove a case. *Galloway* v. *U. S.*, 319 U.S. 372, 389, 87 L. Ed. 1458, 1470 (1942); *New Haven & Hartford Ry. Co.* v. *Henagan*, 364 U.S. 441, 5 L. Ed.2d 183 (1960).

Harmless error is to be disregarded. 28 U.S.C.A., Sec. 2111; Rule 61, Federal Rules of Civil Procedure.

Denial of a jury trial is harmless error where there was no question to submit to the jury. *Forster* v. *Insurance Co. of N. Am.*, 139 F.2d 875 (C.C.A. 2d, 1944); *Freeman Contracter's Inc.* v. *Central Surety and Insurance Corporation*, 205 F.2d 607 (C.C.A. 8th, 1953); *Orenstein* v. *U. S.*, 191 F.2d 184 (C.A. 1st, 1951); *Tanimura* v. *U. S.*, 195 F.2d 329 (C.A. 9th, 1952).

The primary term of the 30-day oil and gas lease expired July 2, 1958. As pointed out in the Opinion of the Court of Appeals (A 17 of the Petition):

> "Within the primary term of the 30 day lease, the owners of the working interest did nothing more than stake out two drilling sites, construct roads and dig certain pits. Thereafter, they did nothing further until the latter part of August, 1958."

The court found that there was nothing to excuse the lack of diligence on the part of the plaintiff and concluded that the 30-day lease had terminated. On admitted facts the trial court held that the lease had terminated as a matter of law. Issues of law are to be resolved by the court. *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 661, 79 L. Ed. 1636, 1638 (1935).

As a matter of fact, it seems that the trial court should have sustained defendant's motion for summary judgment. The assignment of the Ambassador lease provided that the 30-day lease had terminated and contained a specific recognition that Ambassador lease was a valid and effective oil and gas lease. The plaintiffs accepted an assignment of an interest in Ambassador lease which provided that it was subject "to all the provisions of the lease assignment from Ambassador Oil Corporation to Domestic Oil Corporation . . ." and they are bound thereby.

The general rule as to estoppel by deed is recited in 31 C.J.S., "Estoppel," Sec. 37, page 213, as follows:

> "As a general rule, all parties to a deed, and those claiming through them, are bound by the recitals in it legitimately appertaining to the subject matter of it. Recitals of matter of fact in a deed are ordinarily bind-

ing on the grantor; and, in addition, they are *binding on the grantee and his successors in estate* if they claim under the deed, but not otherwise. Such recitals do not bind mere strangers or those who claim by title paramount to the reciting deed." (Emphasis ours.)

In further elaboration of the rule at page 214, it is said:

"Particular recitals, on the other hand, are such as definitely affirm or deny the existence of some fact and either expressly or impliedly show a clear intention of the parties that either one or the other or both shall be precluded from asserting anything to the contrary; these recitals are binding."

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VIVIAN DIFFENDAFFER,
570 First National Building,
Oklahoma City, Oklahoma,
Counsel of Record for Respondent.

C. HAROLD THWEATT,
570 First National Building,
Oklahoma City, Oklahoma,
Attorney for Respondent.

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